Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1565

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WALTER E. RUTHERFORD
One State Street Plaza
New York, New York 10004
Counsel for Petitioners

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Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners The Aetna Casualty and Surety Company, *et al.* respectfully pray that a writ of certiorari issue to

review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on January 31, 1978.

Citations to Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, printed in Appendix B hereto, *infra,* has not as yet been reported. The opinion of the United States District Court for the Western District of North Carolina, Charlotte Division, printed in Appendix B hereto, *infra,* has been reported in 438 F. Supp. 886.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 31, 1978. A timely petition for a rehearing *en banc* was denied on March 9, 1978, and this petition for certiorari was filed within ninety days of that date.

Questions Presented

1. Whether the defendant United States of America has standing to appeal an order disqualifying the United States Attorney and the Department of Justice from representing co-defendants.

2. Whether the standard of review of a Court of Appeals in reviewing an order issued by a district court disqualifying counsel from representing multiple defendants whose interests conflict is limited to determining whether the district court abused its permissible discretion.

3. Whether a record of an evidentiary hearing is necessary in order for the Court of Appeals to reverse an order of disqualification on the basis that no conflict of interest existed, and that even if a conflict of interest was found to exist that there was informed consent.

4. Whether an attorney representing multiple defendants may be disqualified for a potential as opposed to an actual conflict of interest.

Statute Involved

The statutory provisions involved are Disciplinary Rule 5-105 of the Code of Professional Responsibility of the North Carolina State Bar, adopted by the Council of the North Carolina State Bar on January 12, 1973, amended April 13, 1973, and approved by the Supreme Court of North Carolina on April 30, 1973, effective January 1, 1974. 4A N.C. Gen. Stat. Append. VII (1977 Supp.) reprinted *infra* in Appendix A.

Statement of the Case

The Petitioners herein are the liability and hull insurers of Eastern Air Lines, Inc. On September 11, 1974, Eastern Air Lines Flight No. 212 crashed while on approach to landing at Douglas Municipal Airport, Charlotte, North Carolina. As a result of said accident, numerous claims and lawsuits were filed against Eastern Air Lines. Eastern's liability insurers settled these claims and lawsuits for $21,786,457.72 and its hull insurers paid $3,281,000.00 for the destruction of said aircraft. In the instant action, said liability and hull insurers seek indemnity and/or contribution from the respondents and the named defendants on the ground that their negligence caused and/or contributed to the subject accident.

Eastern Air Lines Flight 212 was an instrument flight rules (IFR) aircraft that was approaching Douglas Municipal Airport for a landing on September 12, 1974. As the aircraft approached the airport it came under the air traffic control jurisdiction of defendant Dennis L. Hunter, who was an air traffic controller at the Charlotte approach control facility operated by the Federal Aviation Admin-

istration (FAA). Mr. Hunter proceeded to issue radar vectors to Eastern Flight 212 which were designed to align the aircraft for a VOR instrument approach to runway 36 at the Douglas Muncipal Airport. In providing this navigational guidance Mr. Hunter was required to observe and monitor the flight path of Eastern 212 as reflected on his radarscope. Mr. Hunter had available to him one of the most advanced types of radar (known as ARTS III) utilized by the FAA's air traffic control system. The ARTS III radar not only provided Mr. Hunter with a target return for Eastern 212, but also contained alphanumeric capability which presented on the radarscope the flight designator for the aircraft, its altitude and ground speed. Thus, Mr. Hunter had available to him a continual visual print-out of Eastern's altitude.

For reasons never clearly established, the crew of Eastern Flight 212 conducted their approach at an altitude below the normally prescribed altitudes for a VOR instrument approach to runway 36. This deviation from normally prescribed altitudes continued until the aircraft struck the ground approximately three miles prior to the threshold of runway 36.

During the period of time that Eastern Flight 212 was flying below prescribed altitudes, Mr. Hunter never told the crew of Eastern Flight 212 that their aircraft was flying low, even though this information was visually presented to him on his radarscope. Instead of alerting the crew to this unsafe condition, Mr. Hunter routinely relinguished air traffic control jurisdiction over the flight to the local controller in the Charlotte Tower without any advice as to the aircraft's low altitude. The Charlotte Tower was responsible for clearing aircraft for landing, and at the time of the accident herein was under the command of defendant Bernard C. Groseclose.

In the Charlotte Tower, the local control position was being manned by defendant Alden E. Hare. However,

since Mr. Hare was in a training status, he could not work the position alone. Defendant William L. Hogan was assigned to supervise Mr. Hare and was responsible for monitoring Mr. Hare's activities. Messrs. Hare and Hogan had available to them a repeater radarscope which displayed the same information as the ARTS III radarscope, including the position and altitude of Eastern Flight 212.

As Eastern Flight 212 continued its descent toward the airport, radar separation was being provided to the aircraft. When a controller provides radar separation he must look at his radarscope and monitor the progress of the flight. In spite of this duty to monitor the progress of Eastern Flight 212, Messrs. Hare, Hogan and Hunter never told the crew of Eastern Flight 212 that the aircraft was too low on its approach path even though they constantly had displayed to them on their radarscopes the altitude of said aircraft.

The instant lawsuit was commenced on February 9, 1977. On or about March 21, the individual defendants appeared through the United States Attorney and the Department of Justice and moved for summary judgment on the ground that they possessed official immunity from suit (A. 12).[1] The petitioners responded to said motion for summary judgment on May 2, 1977 (A. 14), and at the same time cross-moved to disqualify the United States Attorney and the Department of Justice from representing the individual defendants on the basis that representation of all defendants would violate Disciplinary Rules (DR) 5-105(A) and 5-105(B) of the North Carolina State Bar Code of Professional Responsibility in that the individual defendants were potentially, if not actually, adverse parties (A.

[1] "A" references are to the Appendix filed in the Court of Appeals. Petitioners have been advised by the Clerk of the Court of Appeals, that the record below should not be forwarded to this Court unless requested.

20).[2] The Department of Justice filed a memorandum of law in response to the motion to disqualify in which it presented arguments to support its position of multiple representation.

A hearing was held on both motions on May 17, 1977 (A. 56). At said hearing Judge James B. McMillan denied the individual defendants' motion for summary judgment and an order to this effect was entered on May 19, 1977 (A. 84).

With respect to the motion to disqualify, Judge McMillan expressed his opinion at the May 17th hearing that an ethical conflict appeared to exist, and he suggested to the Government attorney that the Department of Justice reconsider its position and advise the Court in 30 days (A. 80).

On June 29, 1977, the Department of Justice wrote to the district court requesting a rehearing on petitioners' motion to disqualify (A. 87). On July 5, 1977, petitioners' attorney wrote to the Court opposing said request for a rehearing, and specifically objected to the Department of Justice "meeting at length" with the individual controllers after the district court expressed its opinion at the May 17th hearing as to the impropriety of respondent's representation of the individual defendants (A. 89).

A rehearing on the motion to disqualify was held on July 25, 1977, at which a new Department of Justice attorney basically repeated the arguments advanced by respondent at the May 17th hearing as to why it was proper to have multiple representation (A. 91). Again, the district court expressed problems with the Department of Justice's position and gave respondent ten days to reconsider the matter and advise the Court (A. 109).

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[2] The Code of Professional Responsibility, adopted by the North Carolina State Bar, effective January 1, 1974, 4A N.C. Gen. Stat. Append. VII (1977 Supp.).

On August 3, 1977, petitioners' attorney wrote to Judge McMillan pointing out the apparent mistakes of law and erroneous advice that the Justice Department was giving to the individual defendants (A. 115). On the same date, the Department of Justice advised Judge McMillan that it had concluded that it was in the best interest of all defendants, jointly and severally, that the Department of Justice continue to represent the individual defendants as well as respondent (A. 122).

On August 4, 1977, the district court filed a Memorandum to Counsel wherein the parties were given to August 15, 1977 to "file any further evidence or briefs directed to the plaintiffs' motion" (A. 131). No further briefs or evidence were filed by any party. The respondent never filed any affidavits or other evidence in support of its contention that multiple representation had been agreed to and given on the basis of informed consent.

On or about August 18, 1977, respondent finally filed its answer to the complaint after a motion to compel had been filed by the petitioners (A. 133). The individual defendants have never answered the complaint, and currently are in default.

On October 14, 1977, the district court filed its opinion finding "that there is a conflict of interest between the interests of the government and that of the controllers," and "that adequate representation of the individual controllers can not be provided by lawyers who also have the obligation to defend the United States at large against the charges being made in the pleadings." On the basis of these findings the district court ruled that government counsel was disqualified from representing the individual defendants.[3]

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[3] The order actually stated that "the United States Attorney" was disqualified. But since the district court repeatedly referred

(footnote continued on following page)

The crux of the conflict, according to the district court, was that "[e]ach controller has an interest in avoiding personal responsibility upon any theory that the government has a duty to tell approaching airplane pilots that they are flying too close to the ground." Specifically, "[i]f the plaintiffs prove their theory that the government has or assumed such a duty, each individual controller should be free to defend himself upon the basis, if the evidence justifies it, that he personally assumed no such duty *and* had had no such duty imposed upon him. He should not be prejudiced by representation by a lawyer who has to defend the government generally against that charge." (Appendix B, p. A12). Furthermore, the district court said that each of the individual defendants was entitled to the defense and contention that he performed his job as required, and that if there was any fault, it did not lie with him but with one of the others. Because of these tactical considerations, which the district court said "competent counsel should be free to take if the facts justify," the court determined that it was "fully obvious" that "a conflict exists between the vigorous representation of the interests of each individual defendant one the one hand and a vigorous representation of the interests of the United States at large on the other," and that "it is apparent that the interests of each individual defendant can not be adequately served unless counsel for each defendant is entitled to put the blame upon fellow controllers if the facts so justify." The district court added that multiple representation in this case would violate Ethical Consideration 5-15 and Disciplinary Rule 5-105(B) of the Code of Professional Responsibility, concerning the representation of clients with conflicts of interests.

(footnote continued from preceding page)

to the "Department of Justice," "[g]overnment counsel", and the "Government" in its discussion of the conflict, parties have assumed that the order disqualifies *all* government attorneys from representing the individuals, and the appeal below proceeded on that basis.

The district court rejected on several grounds the Government's argument that even if the defendants were potentially adverse parties, the Government could represent them jointly after making full disclosure and obtaining informed consent. First, the court held that "the consent of an individual litigant can not be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest." Second, the court held that full disclosure and informed consent did not help here, because under Disciplinary Rule 5-105 multiple representation after full disclosure and informed consent is allowed only if it is " 'obvious that [the attorney] can adequately represent the interest' of each individual defendant." Third, the court concluded that "[c]ontrary to the government's view that there is only a remote possibility of conflict among the defendants, this court is of the opinion that an actual conflict exists." The court also rejected the Government's contention that there was no conflict because the United States alone would answer any judgment, and found it "puzzling" that the Government would give this case "so much attention" in light of the general policy of the Department of Justice, (28 C.F.R. §§ 50.15-50.16 (1977)), to " 'pay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department.' "

On October 14, 1977, respondent filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit and oral argument was held before said Court on December 7, 1977.

On January 31, 1978, the United States Court of Appeals rendered its opinion and judgment (Appendix B, p. A18.) reversing the decision of the district court on the grounds that nothing in the record disclosed that an actual conflict of interest existed, that there was little or no possibility

that the individual defendants would incur any personal liability as a result of the litigation, and that the district court erred in its interpretation of DR 5-105(C) in holding that informed consent required the advice of an independent attorney. The Court of Appeals also held that respondent United States of America had standing to prosecute the appeal.

Petitioner's timely request for a hearing *en banc* was denied by the Court of Appeals on March 9, 1978. (Appendix B, p. A27.)

Reasons for Granting the Writ

The increased national and individual concern with the competency and ethics of the Bar has resulted in a proliferation of motions to disqualify counsel in civil cases. Consequently, a new area of law has developed regarding appellate review of orders of disqualification, much to the concern of appellate judges.[4] Divergent and inconsistent opinions by the Circuits with respect to who may appeal and the standard of review with respect to said appeals suggest that it is now time for the Supreme Court to establish appropriate guidelines for such appellate review. The instant case provides a suitable vehicle for review since the Court of Appeals for the Fourth Circuit has adopted herein principles which are inconsistent and in direct conflict with a majority of the Circuit Courts of Appeal.

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[4] Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View*, 50 N.Y.S.B.J. 101 (1978).

POINT I

Appeals should not be allowed by a disqualified attorney or by a party who has not been aggrieved by the order of disqualification.

The order of the district court entered herein on October 14, 1977, disqualified the United States Attorney and the Department of Justice from representing the individual defendants because of an irreconcilable conflict of interest. The individual defendants did not appeal this decision. The only party that objected to the decision was defendant-respondent United States of America, who filed a notice of appeal on the same day as the entry of the order of disqualification. Petitioners contend that respondent United States of America, as a party defendant herein, was not aggrieved by the district court's order since its representation by the United States Attorney and the Department of Justice was not affected by said order. Petitioners further contend that the United States of America lacks standing to prosecute an appeal as attorney for the individual defendants.

The general rule relating to who may properly prosecute an appeal was succinctly and definitively set forth in the case of *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 F. 494 (9th Cir. 1915), *cert. denied*, 239 U.S. 641, 36 S. Ct. 161, 60 L. Ed. 482 (1915):

> "It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has terminated before the

> entry of the judgment or decree sought to be appealed from, he cannot appeal. *Again, the right or title which the appellant seeks to establish must be his own and not that of a third person.*" 233 F. at 499 (emphasis added).

See also Fuller v. *Branch County Road Commission*, 520 F.2d 307, 309 (6th Cir. 1975), *citing Lewis* v. *United States*, 216 U.S. 611, 30 S. Ct. 438, 54 L. Ed. 637 (1910) ("The general rule is that only a party who is aggrieved by an order can appeal from it."); *Utility Contractors Association* v. *Toops*, 507 F.2d 83 (3d Cir. 1974); *Mount Vernon Sav. Bank* v. *Wardman*, 173 F.2d 648, 649 (D.C. Cir. 1949) ("A party to an appeal must show that he is aggrieved by the order appealed from."); *In re Phoenix Dress Co.*, 131 F.2d 726 (7th Cir. 1942) (individual possessing power of attorney held not an aggrieved party); *International Brotherhood of Teamsters, Local 523* v. *Keystone Freight Lines*, 123 F.2d 326, 330 (10th Cir. 1941) ("One may not appeal from a judgment of a court in which he has no interest."); *Hawley* v. *Hawley*, 114 F.2d 505, 507 (D.C. Cir. 1940) ("[A]n appeal can be taken only by one who is directly aggrieved by the order appealed from."); *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F.2d 453, 454 (9th Cir. 1939) ("The appeal appears also to include the dismissed defendant . . ., but as he is not a party to the judgment appealed from such attempted appeal is dismissed.").

As a co-defendant, the United States certainly has a general interest in who represents the individual defendants herein, but as a party defendant it has no pecuniary interest at jeopardy[5] nor is it harmed by an order barring

[5] Although 28 C.F.R. §§ 50.15-50.16 (1977) (Appendix A, p. A4), permit the Department of Justice to hire and pay for outside counsel to defend Government employees in conflict-of-interest situations, the Department of Justice did not choose to exercise this option. The record does not reveal if the Department of Justice offered this option to the individual defendants.

its attorneys from also representing co-defendants.[6] *See generally Mayer* v. *National Missile & Electronics, Inc.*, 326 F.2d 401 (9th Cir. 1964) (party interested in subject matter of litigation but not directly aggrieved by order cannot appeal); *United States* v. *Seigel*, 168 F.2d 143 (D.C. Cir. 1948) (United States, not a party to the lower court proceeding, held not entitled to bring an appeal as the "real party in interest"). Indeed, as this Court held in *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U.S. 265, 1 S. Ct. 131, 27 L.Ed. 115 (1882):

> "Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree." 106 U.S. at 269.

When petitioners asked the Circuit Court to dismiss the appeal by the United States since it was not an aggrieved party, the Government argued in its reply brief that the appeal should be allowed because:

> "The district court's order of disqualification was directed to the Government, not to the individual controllers, and it prevents the Government from undertaking legal representation on behalf of the controllers." (Reply Brief of the United States, p. 7.)

The Court of Appeals agreed with the United States' position on the basis that:

> "The United States Attorney and the Department of Justice are the targets of the district court's order

[6] At oral argument before the Court of Appeals, the Assistant Attorney General for the Civil Division argued that the United States was harmed because the district court order prevented the defendants from presenting a united defense. The Government's argument presupposes that independent counsel would not agree to a united defense, which may be the exact reason why the Department of Justice has disregarded its own regulations (fn. 5, *supra*) in not hiring independent counsel for the individual defendants.

and, in our opinion, it would be sophistic to say that the Government is not adversely affected by their disqualification. See *In re Investigation before April 1975 Grand Jury*, 531 F.2d 600, 606 (D.C. Cir. 1976)." (Appendix B at p. A22.)

Petitioners would submit that it is obvious from the foregoing that the United States prosecuted its appeal herein, not in its capacity as an aggrieved party defendant, but, rather, as an aggrieved lawyer who had been disqualified from representing a client,[7] and the Court of Appeals upheld its standing to proceed with the appeal on that basis.[8]

In allowing an attorney to appeal in a civil action when his client has not appealed, the Court of Appeals herein has taken a position that is contrary to decisions rendered by the Courts of Appeal for the Sixth, Seventh, Eighth

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[7] Petitioners do not believe it proper to interpret a notice of appeal filed by the United States of America to be an appeal by the Government in its capacity as lawyer for the individual defendants. If the Government wanted to appeal in its capacity as lawyer, it would seem that the Attorney General of the United States should have appealed in his individual capacity.

[8] Both the United States and the Court of Appeals cited as authority for the Government's right to appeal *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 606 (D.C. Cir. 1976), which allowed an attorney to appeal when he was disqualified from representing twenty-one witnesses before a grand jury. Petitioners would submit that such precedent is not relevant to the instant situation. In grand jury proceedings there are no parties who can prosecute an appeal, and in the case cited the attorney would obviously lose a fee and therefore had a pecuniary interest that was directly affected by the order of disqualification—elements which are not present herein.

In addition, the Government and the Court of Appeals apparently overlooked the fact that the *In re Investigation* Court never considered the issue of whether, in the absence of the attorney, the union, (similarly situated to the Government in the instant case) which had procured the attorney for its members, would have standing to appeal.

and Ninth Circuits. Thus, in *De Korwin* v. *First National Bank*, 235 F.2d 156 (7th Cir. 1956), the Court dismissed an appeal prosecuted solely by an attorney:

> "In view of the fact that the only party to the suit in a state court who has been restrained, Mrs. Tonella, has not appealed, and Rinella claims only to have been counsel for her, it follows that, to the extent his connection with the partition case is concerned, that is, his claimed representation of Mrs. Tonella, his services are at an end. She has been restrained, and does not object to the restraint. No party in interest appeals." 235 F.2d at 159.

Cf. Brown v. *Grand Trunk Western R. Co.*, 124 F.2d 1016 (6th Cir. 1941) ("The general rule is that an attorney cannot, on his own motion, appeal from a judgment or decree injuriously affecting the interest of his client without said client's consent.").

Similarly, in *First Iowa Hydro Electric Corp.* v. *Iowa-Illinois Gas & Electric Co.*, 245 F.2d 630 (8th Cir.), *rehearing denied*, 355 U.S. 921, 78 S. Ct. 339, 2 L. Ed. 2d 281, (1957), the party appellants were joined in their appeal by four attorneys who attempted to prosecute the appeal on behalf of their clients and also on their own behalf, based on their fee contract of employment and time expended on the action. In sustaining the motion to dismiss the appeal, the Court remarked as follows:

> "Under the Federal Rules of Civil Procedure, appeals cannot be taken from final judgments of the District Court otherwise than by parties to the judgments. Rule 73 provides that 'a party may appeal from a judgment by filing with the district court a notice of appeal.' The four attorneys were not parties and they neither asked nor obtained leave to become parties. We know of no appeal by non-parties." 245 F.2d at 631.

More recently, in *City of Inglewood* v. *Unnamed Citizens, Residents & Owners of Property Within the City of Inglewood,* 508 F.2d 1283 (9th Cir. 1974), special counsel purporting to represent certain unnamed citizens, whose interests were alleged to have been jeopardized by a dismissal of the action, were held to have no standing to prosecute an appeal from the dismissal. Although the special counsel was apparently retained by written contract with the City of Inglewood to prosecute the actions, there was no demonstration that the unnamed appellants had actually authorized special counsel to represent them either in the original action or on appeal.

Based upon the foregoing case authority, it appears that the Fourth Circuit stands alone in allowing appeals in civil suits by an attorney from orders to which his client has not appealed. Four different Circuit Courts of Appeal have case authority to the contrary and do not allow the attorney (even though he has a pecuniary interest that is affected) to appeal. This anomalous position by the Fourth Circuit demands correction and warrants review by this Court.

POINT II

The Circuit Court failed to adhere to accepted standards in reviewing the disqualification order.

A. Failure to Adhere to the Abuse of Discretion Standard of Review.

It has been well established over the years that the proper standard of review by an appellate court as to disqualification orders is whether or not the district court judge abused his discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Kreda* v. *Rush,* 550 F.2d 888, 889 (3d Cir. 1977); *In re Gopman,* 531 F.2d 262, 266, *rehearing en banc denied,* 542 F.2d 575 (5th Cir. 1976); *Schloetter* v. *Railroc of Indiana, Inc.,* 546 F.2d 706, 710 (7th Cir. 1976); *Fred Weber, Inc.* v. *Shell Oil Co.,* 566 F.2d 602,

605 (8th Cir. 1977); *Gas-A-Tron of Arizona* v. *Union Oil Company of California,* 534 F.2d 1322, 1325 (9th Cir.) *cert. denied,* 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976); *Redd* v. *Shell Oil Co.,* 518 F.2d 311 (10th Cir. 1975). With the growing proliferation of motions to disqualify, the abuse of discretion standard of review has been recently reaffirmed with emphasis. *Allegaert* v. *Perot,* 565 F.2d 246, 251 (2d Cir. 1977); *Meat Price Investigators Association* v. *Spencer Foods, Inc.,* No. 77-1605 (8th Cir. filed Mar. 3, 1978).

The Court of Appeals for the Third Circuit clearly and concisely articulated the rule in the often-cited case of *Richardson* v. *Hamilton International Corp.,* 469 F.2d 1382 (3d Cir. 1972), *cert. denied,* 411 U.S. 986, 98 S. Ct. 2271, 36 L. Ed. 2d 964 (1973):

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibilities, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. *The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession.* This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.
>
> . . . [*T*]*he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion.* Greene v. Singer, 461 F.2d 242 (3d Cir. 1972); cert. denied, 409 U.S. 848, 93 S. Ct. 54, 34 L. Ed. 2d 89 (Oct. 10, 1972)." 469 F.2d at 1385-86 (footnotes omitted, emphasis added).

The abuse of discretion standard also appeared to be the prevailing rule in the Fourth Circuit until publication of the initial decision. *In re Investigation Before February,*

1977, Lynchburg Grand Jury, 563 F.2d 652, 657 (4th Cir. 1977). In fact, only six weeks before the decision herein the Fourth Circuit decided *United States* v. *Clarkson,* 567 F.2d 270 (4th Cir. 1977), wherein they held:

> "Had the petitioner been dissatisfied with [illegible] order of disqualification, he could, rather than acquiescing, have appealed the order. . . . However, an order of disqualification by the district court will only be reversed for clear abuse of discretion." 567 F.2d at 272 n. 2 (citations omitted).

Indeed, the Fourth Circuit carefully cautioned its district courts by setting forth the criterion upon which a district court should consider a disqualification motion:

> "In determining whether to disqualify counsel for conflict of interest the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety' it is to resolve all doubts in favor of disqualification. *Gas-A-Tron of Arizona* v. *Union Oil Co. of California* (9th Cir. 1976) 534 F.2d 1322, 1324-25; *United States* v. *Trafficante* (5th Cir. 1964) 328 F.2d 117, 120." 567 F.2d at 273 n. 3.

In the instant case the Fourth Circuit attempted to justify its departure from the "abuse of discretion standard of review" by stating that some recent decisions had questioned the appropriateness of such a standard where only a legal issue was involved.[9] The divergence of the

[9] The Fourth Circuit hypothesized the issue as being only legal even though it never stated what this legal issue was. Petitioners objected to this premise since they had always claimed that the Government had not conceded the facts as alleged by the petitioners (*supra,* pp. 4-5), and that there had not been informed consent by the individual defendants (Appellees' Brief, pp. 14-15).

Fourth Circuit from the majority rule was based on its interpretation of *obiter dictum* emanating from the Third Circuit in *American Roller Co.* v. *Budinger,* 513 F.2d 982, 985 n. 3 (3d Cir. 1975),[10] and *Krowngold* v. *Triester,* 521 F. 2d 763, 765 n. 2 (3d Cir. 1975),[11] both of which involved Canon 4 of the Code of Professional Responsibilities and language from the Fifth Circuit in *Woods* v. *Covington*

[10] "The failure to consider Counts I and II would require reversal of the district court's denial of Du Pont's motion even if an 'abuse of discretion' standard were applied. *See* Richardson v. Hamilton Int'l Corp., *supra,* 469 F.2d at 1386; Greene v. Singer Co., 461 F.2d 242 (3rd Cir.), cert. denied, 409 U.S. 848, 93 S. Ct. 54, 34 L. Ed. 2d 89 (1972). We have serious reservations, however, whether our scope of review is limited to finding an abuse of discretion in disqualifiation cases such as this. It appears that in issue in these cases is the purely legal question of whether two allegedly adverse representations are so intertwined that it can be said that in the former representation the attorney 'might have acquired' material 'substantially related' to the subject matter of the second representation. Determination of that question leaves little leeway for the exercise of discretion."

[11] "We applied the 'abuse of discretion' standard in reviewing district court dispositions of motions to disqualify counsel grounded on Canon 4 of the Code of Professional Responsibility which relates to the fiduciary relationship existing between lawyer and client, in *Richardson* v. *Hamilton International Corporation,* 469 F.2d 1382, 1386 (3rd Cir. 1972), *cert. denied,* 411 U.S. 986, 93 S. Ct. 2271, 36 L. Ed. 2d 964 (1973); *Greene* v. *The Singer Company,* 461 F.2d 242, 243 (3rd Cir.), *cert. denied,* 409 U. S. 848, 93 S. Ct. 54, 34 L. Ed. 2d 89 (1972).

We have, however, in a Canon 4 situation, recently expressed 'serious reservations . . .' whether our scope of review is limited to finding an abuse of discretion in disqualification cases such as this [where] it appears that in issue . . . is the purely legal question whether two allegedly adverse representations are so intertwined that it can be said that in the former representation the attorney 'might have acquired' material 'substantially related' to the subject matter of the second representation' and the '[d]etermination of that question leaves little leeway for the exercise of discretion.' *American Roller Company* v. *Budinger,* 513 F.2d 982, 985 n. 3 (3rd Cir. 1975)."

County Bank, 537 F.2d 804 (5th Cir. 1976), which involved Canon 9 of the Code of Professional Responsibility.

It is apparent from a reading of the Third Circuit decisions, however, that they do not establish a different standard of review for disqualification cases. In fact, the most recent decisions by the Third Circuit, which the Fourth Circuit did not cite in its opinion, clearly hold that the abuse of discretion standard is still the law. *Kreda* v. *Rush,* 550 F.2d 888, 889 (3d Cir. 1977); *Akerly* v. *Red Barn System, Inc.,* 551 F.2d 539 (3d Cir. 1977).

Insofar as the Fifth Circuit's opinion in *Woods* v. *Covington County Bank,* 537 F.2d 804 (5th Cir. 1976), is concerned, its validity has been cast in doubt by a later decision by the Fifth Circuit, which again was not cited by the Fourth Circuit. The decision in *Brown & Williamson Tobacco Corp.* v. *Daniel International Corp.,* 563 F.2d 671 (5th Cir. 1977), clearly indicates that the Fifth Circuit has not determined what standard of review it will apply:

> "This circuit has not clearly chosen the standard by which it reviews a trial judge's decision to disqualify, or not to disqualify, an attorney accused of unethical conduct. One Panel has applied the abuse of discretion standard. See *In re Gopman,* 531 F.2d 262, 266 (5th Cir.), *rehearing en banc denied,* 542 F. 2d 575 (5th Cir. 1976). Another has applied the 'clearly erroneous' test to fact issues while suggesting careful review of a trial court's rulings on ethical violations. See *Woods* v. *Covington County Bank,* 537 F.2d 804, 810 (5th Cir. 1976). Both of these standards yield the same result in this case." 563 F. 2d at 673 n. 1.

Based upon the foregoing, petitioners would submit that in failing to follow the abuse of discretion standard of review, the Fourth Circuit has clearly departed from the prevailing rule followed by the other Circuit Courts of Appeal.

B. Failure to Require a Record of Informed Consent.

The district court, based on the pleadings and its knowledge of the facts surrounding the accident,[12] found a conflict of interest of sufficient magnitude and concern to require the disqualification of the United States Attorney and the Department of Justice from representing the individual defendants. Nevertheless, the Court of Appeals found the facts to be undisputed, and therefore concluded that the district court had no advantage over an appellate court in resolving the disqualification question. The Fourth Circuit found "nothing in the record to support the conclusion of the [district] court that 'an actual conflict exists.'" (Appendix B, p. A23.)

However, the record of the proceedings before the district court, composed solely of briefs submitted by the parties and oral argument at two nonevidentiary hearings, clearly fell short of the factual showing required to be considered by an appellate court for reversal of a lower court order of disqualification. The Department of Justice never submitted any affidavits or other evidence to support its contentions that it had fully informed the individual defendants of their legal rights and that said defendants consented to the continued representation by Government attorneys.[13] The Government failed to make any eviden-

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[12] Judge McMillan had been assigned all cases arising out of this incident by the Judicial Panel on Multi-District Litigation. *In re Air Crash Disaster at Charlotte, North Carolina,* 393 F. Supp. 1404 (J.P.M.D.L. 1975). In addition, he had presided at one trial arising out of this accident at which the individual defendants testified.

[13] In advising the individual defendants of their rights, the Department of Justice failed to follow its own internal procedures with respect to conflict-of-interest and multiple-representation situations. The *Report to the Assistant Attorney General on Representation of Government Employees in Civil Litigation,* dated March 21, 1977, and prepared by the Representation Committee of the General Litigation Section, Civil Division, states:

(footnote continued on following page)

tiary record of the alleged informed consent. The Government attempted to justify this lack of proof of informed consent (Reply Brief of the United States, pp. 4-5) on the basis that at the second hearing the district court stated in colloquy between it and the Department of Justice attorney:

> "I'll make the assumption that, as you reported earlier, you've talked to each of your prospective or present clients individually and that they've indicated to you that they're willing to be represented by government counsel. Now, I'm not inquiring into anything about the fact that has taken place, if that's what you're getting to, and that you have discussed it at great length. What I want to know is from the standpoint of a lawyer, how can you represent people who have interests which conflict each with the other?" (A. 95)

Clearly this assumption was only that the parties had talked, and that the controllers had said they were willing to be represented by Government counsel. There was no assumption that there had in fact been "informed con-

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> "V. With regard to ascertaining defendant conflicts at the start of litigation, it is recommended that initial client interviews be conducted in those cases presenting potential for conflicting interests through the use of one of the following approaches:
>
> (1) Intra or inter-divisional screening committees to conduct initial interviews consisting of attorneys who would not be assigned to any case on which they conducted initial screening; or
>
> (2) *Continuation of the present practice* of hiring a private attorney to conduct initial client interviews, at least in those cases where there is some potential for a disclosure of client confidences which would preclude representation of any defendant." pp. 26-27 (emphasis added).

Said report was not before the district court, but was presented to the Court of Appeals in a motion to supplement the record which was granted. (Appendix B, pp. A27-28.)

sent" in the full legal meaning of that term. Indeed, after the second hearing wherein the above-cited colloquy occurred, and after petitioners' counsel wrote to the Court pointing out wherein Government counsel had failed to properly advise the individuals and therefore there could not have been informed consent, the district court issued an order inviting counsel to submit any further "evidence" on the motion. The Government did not submit anything.

When the district court discussed the issue of informed consent in its decision, it postulated the issue as follows:

> "Government counsel say that each of the individual defendants has been fully informed and has consented to the joint representation which is being afforded, and that this ought to solve the problem. There are two difficulties with that point of view. In the first place, the consent of an individual litigant can not be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. In the second place, even though consent has been given, DR 5-105 is not complied with because it is not 'obvious that (the attorney) can adequately represent the interest' of each individual defendant." (Appendix B, p. A14.)

Based upon the foregoing, it appears clear that the district court did not "accept" the representation of Government counsel that "there was no dispute among them (the individual defendants) with respect to their duties and responsibilities or the details of the plane crash" (Appendix B, pp. A23-24.), and it was wrong for the Court of Appeals to make this factual assumption based upon the above-cited record.[14]

[14] Insofar as the Court of Appeals found informed consent since "counsel for the air controllers' union participated in the

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Since there was no record of informed consent, it was clearly improper for the Court of Appeals to reverse the district court on the basis that the record showed that the individual defendants had been fully informed of the legal issues and that they agreed to representation by the Government attorneys.[15]

In reversing on the basis of an inadequate and factually incomplete record, the Fourth Circuit again took a position entirely different from every other Court of Appeals that has been faced with a similar issue. In *Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975), the Court of Appeals for the Tenth Circuit set forth the proper procedure to ascertain the facts necessary to permit a meaningful review by the Court of Appeals:

> "We now reverse on the grounds that the record before us is inadequate to permit a review of the action taken by the trial court.

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discussions between the individual defendants and the Department of Justice, and we think it reasonable to assume that he was aware of any problems and properly advised the controllers with respect to their best interests" (Appendix B, p. A25.), there is no record to support this "assumption." Indeed, we believe the Court of Appeals was misled on this point because petitioners' information is that at least one, and possibly two, of the individual defendants did not belong to the union. We request that the Solicitor General verify the union status of the individuals and advise this Court as to the true facts.

[15] The Court of Appeals gave no consideration to the fact that an employer/employee relationship existed between the United States and the individual defendants and that this relationship *per se* had to exert pressure on the employees to go along with their employer's desires. *See* Schnapper, *Legal Ethics and the Government Lawyer*, 32 The Record 649, 656-57 (1977). The economic pressures were obvious since the Government refused to appoint independent counsel to assess the conflict (fn. 13, *supra*), refused to hire independent counsel pursuant to 28 C.F.R. §§ 50.15-50.16, and refused to prosecute an appeal on behalf of the individuals. The financial interest of the Department of Justice herein would appear to be in violation of DR 5-101(A). (Appendix A, p. A1.)

> In our view the verified motion to disqualify raises ethical questions that are conceivably of a serious nature. In such circumstances a written response should be required. The trial court should then hold a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto, which hearing should include the taking of testimony. *A motion of this type should not be resolved on the basis of mere colloquy between court and counsel.* At the conclusion of such hearing the trial court should then make specific findings and conclusions, to the end that this court will then have a record before it which will permit a meaningful review, should review be sought.
>
> Order reversed and cause remanded for further proceedings consonant with the views herein expressed." 517 F.2d at 21-22 (emphasis added).

See Melamed v. *ITT Continental Baking Co.*, 534 F.2d 82, 84-85 (6th Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 608-09 (D.C. Cir. 1976); *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 316 n. 3 (10th Cir. 1975); *Kreda* v. *Rush*, 550 F.2d 888, 890 (3d Cir. 1977).

The Court in *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82, 84-85 (6th Cir. 1976) considered a district court's record composed similarly to that herein. The *Melamed* Court agreed with the observation made by the Tenth Circuit in *Fullmer*, and unlike the Court of Appeals herein, the *Melamed* Court openly conceded the inadequacy of the record and remanded the matter to the district court for further proceedings:

> "Although we find that the district court's order is appealable, examination of the record discloses that the remaining issues on appeal cannot adequately be determined or disposed of until the district court has held a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto. *The district court reached the conclusion that the mo-*

tion to disqualify was not well taken, but apparently this conclusion was based upon briefs of counsel with one supporting affidavit filed with the movant's brief. It may be that the court also relied to some extent upon colloquies between the court and counsel. There is nothing in the record to indicate that an evidentiary hearing was held or a factual inquiry made to determine the basis or lack of basis for Continental's standing to maintain the motion to disqualify, or *to determine the operative and controlling facts on which a decision could appropriately be made whether or not the motion to disqualify should be sustained.* Under the circumstances, we are in agreement with the observations made by the Court of Appeals for the Tenth Circuit in *Fullmer* v. *Harper*. . . ." 534 F.2d at 84-85 (emphasis added).

Clearly, if the Court of Appeals herein disagreed with the findings of the district court, rather than reverse on an inadequate record, it should have remanded the action to the district court for an evidentiary hearing. Such a procedure would have been in accord with the prevailing approach taken by the Circuit Courts and certainly such an important issue as "informed consent" should not be resolved on the basis of assumption.[16]

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[16] As one commentator recently observed:

"There are substantial difficulties present in the obtaining of the client's consent to the continuation of multiple representation in the hope of either avoiding or spotting conflicts and dealing with them at a later time. As one lawyer told me 'a lawyer can obtain permission from his client to continue with multiple representation, even in clear conflict situations, depending upon how the problem is explained to the client.' This is likewise the view of Professor Katz of Yale. Katz likens the problem of a lawyer explaining a conflict to a client to that of a doctor explaining various medical alternatives to a patient. It isn't only the mere words used in the

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C. An Actual Conflict Does Not Have to Exist in Order to Warrant Disqualification.

Insofar as the Court of Appeals herein reversed the district court on the basis that the record did not disclose an actual conflict, it completely misinterpreted the Code of Professional Responsibility and emasculated the intent of the Ethical Considerations behind the Disciplinary Rules.

Disciplinary Rule (DR) 5-105, as adopted by the North Carolina State Bar, provides in part:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C)."

The ethical considerations underlying these Disciplinary Rules are contained in EC 5-14 and 5-15, which provide:

"*EC 5-14* Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will

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explanation that the client considers in making up his mind. The degree of faith and confidence in the professional as well as the complexity of the subject matter bear greatly on the decision made by the client or patient. Where the confidence is high and the subject matter difficult, the 'consent' given may be less than knowing and legitimate." Meyers, *Ethical Considerations in the Representation of Multiple Creditors Against a Single Debtor*, 51 Am. Bankr. L.J. 19, 24 (1977).

adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who *may* have conflicting interests.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. *A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests.* If a lawyer accepted such employment and the interests did become actually conflicting, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason, it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involved in litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become conflicting, withdrawal is less likely to have a disruptive effect upon the causes of his clients." (Emphasis added.)

In applying these Disciplinary Rules and Ethical Considerations, the district court had a great familiarity with the facts surrounding this accident since it had been assigned all cases arising out of this tragedy by the Judicial Panel on Multi-District Litigation. *In re Air Crash Disaster at Charlotte, North Carolina,* 393 F. Supp. 1404 (J.P.M.D.L. 1975). Based upon its knowledge of the fac-

tual situation that would develop, it was obvious to the district court that each individual defendant had a right to defend himself by blaming one of the other defendants and/or other personnel of the United States of America as sole cause of the instant accident.[17] (Appendix B, pp. A12-13.)

Thus, the petitioners charged that defendant Groseclose was negligent in failing to properly supervise and train defendants Hare, Hogan and Hunter. If this allegation is proved, any attorney representing Messrs. Hare, Hogan and Hunter should logically cross-claim against Mr. Groseclose. If the allegation cannot be proved, and if in fact proper training was given, then Mr. Groseclose should cross-claim against Messrs. Hare, Hogan and Hunter because they failed to follow the training that was given to them. Likewise, Mr. Hogan was supervising Mr. Hare, who was in a trainee status as local controller. If a mistake was made at this position, Mr. Hare should logically blame Mr. Hogan for improper supervision and training.

In addition, Mr. Hare and Mr. Hogan might claim that it was Mr. Hunter's responsibility to issue a safety advisory to Eastern Flight 212, and that the aircraft should not have been turned over to them by Mr. Hunter without the advice that the aircraft was at an improperly low altitude. Likewise, Mr. Hunter might claim that the responsibility to issue a safety advisory to the aircraft rested with Messrs. Hare and Hogan since they were in radio contact with the flight.

Whatever the ultimate cross-claim situation is, it would appear clear that an attorney representing each defendant

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[17] North Carolina recognizes contribution and indemnity. *North Carolina Contribution Among Joint Tort-Feasors Act,* N.C. Gen. Stat. §§ 1B-1 to 1B-6; *Steele* v. *Moore-Flesher Hauling Co.,* 260 N.C. 486, 133 S.E.2d 197 (1963); *Hendricks* v. *Leslie Fay, Inc.,* 273 N.C. 59, 159 S.E. 2d 362 (1968); *Ingram* v. *Garner,* 16 N.C. App. 147, 191 S.E. 2d 390 (1972).

would be compelled to inquire and expose all the training and supervision that existed at the Charlotte Tower and the responsibilities of each one of the controllers with respect to the issuance of safety advisories. This would appear to be a formidable task for a Department of Justice attorney whose main loyalty would be in defending the agency involved. *See* Poirier, *The Federal Government Lawyer and Professional Ethics,* 60 A.B.A.J. 1541 (1974); Federal Ethical Consideration 5-1, 4-1 and 4-2. (Appendix A, pp. A3-4.)

With this state of facts, there is no doubt that Judge McMillan had a sound basis in concluding:

> "I find that there is such a conflict and that adequate representation of the individual controllers cannot be provided by lawyers who also have the obligation to defend the United States at large against the charges being made in the pleadings."

We would submit that the conflict found by the district court, whether it be actual or potential, warranted the immediate disqualification of Government counsel[18] and

[18] The Court of Appeals suggested that the motives of the moving party should be taken into account in considering motions to disqualify, and that in the present case petitioners' counsel may have been motivated by tactical reasons. Of course, the district court made no such finding, and the Court of Appeals ignored the duty of counsel to bring such conflicts of interest to the attention of the trial judge (*In re Gopman,* 531 F.2d 262, 265-66 (5th Cir. 1976); *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.,* 345 F. Supp. 93, 98 (S.D.N.Y. 1972); Code of Professional Responsibility EC 1-4, 4A N.C. Gen. Stat. Append. VII (1977 Supp.)) and also ignored the decision in *Fox* v. *Allegheny Airlines, Inc.* (S.D. Ind. 1972) (A. 41-53), wherein Government counsel withdrew on the eve of trial from representing a defendant air traffic controller on the ground of a conflict of interest. Petitioners' interest in the conflict is not irrelevant because they are the ones who will be prejudiced by additional expenses if Government counsel waits until the eve of trial to recognize their ethical conflict.

was in accord with the prevailing approach by the Circuit Courts of Appeal. As the Court of Appeals for the Fifth Circuit stated in *In re Gopman,* 531 F.2d 262 (5th Cir. 1976):

> "We also must remember that the [district] potential conflict permits it 'to nip any potential conflict of interest in the bud,' *Tucker* v. *Shaw,* 378 F.2d 304, 307 (2d Cir. 1967). On the record before this Court, it is clear that the possibility of a conflict had become great enough for the trial court to exercise its discretion." 531 F.2d at 266.

See United States v. *Clarkson,* 567 F.2d 270, 273 n. 3 (4th Cir. 1977); *Schloetter* v. *Railroc of Indiana, Inc.,* 546 F.2d 706 (7th Cir. 1976); *Gas-A-Tron of Arizona* v. *Union Oil Co. of California,* 534 F.2d 1322, 1324-25 (9th Cir. 1976); *International Electronics Corp.* v. *Flanzer,* 527 F.2d 1288, 1291 (2d Cir. 1975); H. Drinker, *Legal Ethics* 104-05 (1953).

In the instant case, the actual or potential conflict was not resolved in favor of disqualification, even though the Circuit Court itself had mandated such an approach. *United States* v. *Clarkson,* 567 F.2d 270, 273 n. 3 (4th Cir. 1977). Instead, the conflict was resolved in favor of multiple representation by asserting that "there is little or no possibility that the four controllers will incur any personal liability as a result of this litigation." (Appendix B, p. A24.) This reasoning is unique to the Fourth Circuit, and it is indeed difficult to see its relevancy to the district court's responsibility to supervise the Bar and to ensure that all attorneys practicing before it adhere to the Code of Professional Responsibility. *See* Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession,* 1976 Utah L. Rev. 95. The Disciplinary Rules cannot be violated just because a lawyer's client may not have to pay a judg-

ment.[19] As the Preliminary Statement to the Code of Professional Responsibility states:

> "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." 4A N.C. Gen. Stat. Append. VII (1977 Supp.).

Disciplinary Rule 1-102(A)(1) provides:

> "(A) A lawyer shall not:
>
> (a) Violate a Disciplinary Rule."

The Ethical Considerations in support of this Rule provide:

> "*EC 1-1* A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."
>
> "*EC 1-4* The integrity of the profession can be maintained only if conduct of lawyers in violation of

[19] The Court's premise that the individuals assume no risk of paying any judgment is erroneous. Pursuant to 28 U.S.C. § 2676 (Appendix A, p. A9.), judgment entered against the United States would constitute a bar to any action against the employee. However, 28 U.S.C. § 2676, by its very wording, only becomes applicable once a judgment is entered against the Government. If this case is tried, a jury will return a verdict against the individuals while the Court will have to enter findings against the United States. Under Rule 58, Fed. R. Civ. P., a judgment may be entered immediately upon a general verdict by a jury. It is therefore possible that a judgment may be entered against the individuals long before the Court enters its findings with respect to the United States. Also, the rule as to pre-judgment and post-judgment interest may vary between the Government and the individuals. All of these factors make it far from infallible that the controllers will not have to pay a judgment.

> the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules."

Petitioners would submit that a lawyer's ethics are not dependent upon the ultimate liability of his client. The end does not justify the means. In glossing over the Justice Department's conflict of interest herein, the Fourth Circuit has sanctioned procedures that are ethically wrong. The danger herein is that if multiple representation continues, our judicial system is deprived of its basic predicate—zealous advocacy based upon unimpaired independent professional judgment. If this occurs, the judicial system has failed in its duty to litigants.

The basic predicate in an adversary system is succinctly stated in EC 5-1 and EC 7-19:

> "*EC 5-1* The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."
>
> "*EC 7-19* Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The

duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

The danger, thus, is not just the appearance if impropriety, but the clear and present danger to the client *and* to the judicial system that the presentation of the case by an attorney representing multiple defendants inevitably will be less than it ought to be, thus depriving the court of its ability to sift and weigh all the evidence as it is required to do in meeting its obligation to find the truth and render justice to all.[20]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

WALTER E. RUTHERFORD
One State Street Plaza
New York, N. Y. 10004
Counsel for Petitioners

On the Brief:

PETER HOENIG
ALAN D. REITZFELD

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[20] "[T]o the degree that substantial justice requires, a judge must exercise his power to enforce ethical standards through disqualification of attorneys. No judge properly can disregard this responsibility to enforce respect for the judicial process where the very integrity of that process is threatened by an attorney's conflict of interest." Judge Orrin G. Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 Fordham L. Rev. 1097, 1111-12 (1976).

APPENDIX A

Statutes.

North Carolina State Bar Code of Professional Responsibility, 4A N.C. Gen. Stat. Append. VII (1977 Supp.).

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105 (C).

(C) In the situations covered by DR5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

FEDERAL BAR ASSOCIATION: FEDERAL ETHICAL CONSIDERATIONS (Adopted November 17, 1973)

Canon 4. A Lawyer Should Preserve the Confidences and Secrets of a Client.

F.E.C.-4-1. If, in the conduct of official business of his department or agency, it appears that a fellow employee of the department or agency is revealing or about to reveal information concerning his own illegal or unethical conduct to a federal lawyer acting in his official capacity the lawyer should inform the employee that a federal lawyer is responsible to the department or agency concerned and not the individual employee and, therefore, the information being discussed is not privileged.

F.E.C.-4-2. If a fellow employee volunteers information concerning himself which appears to involve illegal or unethical conduct or is violative of department or agency rules and regulations which would be pertinent to that department's or agency's consideration of disciplinary ac-

tion, the federal lawyer should inform the individual that the lawyer is responsible to the department or agency concerned and not the individual employee.

• • •

Canon 5. A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

F.E.C.-5-1. The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. He is required to exercise independent professional judgment which transcends his personal interests, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of the government.

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28 C.F.R. §§ 50.15-50.16 (1977).

PART 50—STATEMENTS OF POLICY

§ 50.15 Representation of Federal employees by Department of Justice Attorneys or by private counsel furnished by the Department in state criminal proceedings and in civil proceedings and Congressional proceedings in which Federal employees are sued or subpoenaed in their individual capacities.

(a) Under the procedures set forth below, a federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by § 15.1 of this chapter.

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit a request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency, forthwith. The employee's employing federal agency shall submit to the Civil Division in a timely manner a statement, with all supporting data, as to whether the employee was acting within the scope of his employment, together with its recommendation as to whether representation should be provided. The communication between the employee and any individual acting as an attorney at his employing agency, with regard to the request for representation, shall be treated as subject to the attorney-client privilege. In emergency situations the Civil Division may initiate conditional representation after communication by telephone with the employing agency. In such cases, appropriate written data must be subsequently provided.

(2) Upon receipt of the agency's notification of request for counsel, the Civil Division will determine whether the employee's actions reasonably appear to have been performed within the scope of his employment, and whether providing representation is in the interest of the United States. If a negative determination is made, Civil Division will inform the agency and/or the employee that no representation will be provided.

(3) Where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter for which representation is sought, the Civil Division will contact a designated official in the Criminal Division for a determination whether the employee is either a target of a federal criminal investigation or a defendant in a federal criminal case. An employee is the target of an investigation if, in addition to

being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime. In appropriate instances, Civil Rights and Tax Divisions and any other prosecutive authority within the Department should be contacted for a similar determination.

(4) If the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") indicates that the employee is not the target of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter other than that for which representation has been requested, then representation may be provided.

(5) If the prosecuting division indicates that the employee is the target of a criminal investigation concerning the act or acts for which he seeks representation, Civil Division will inform the employee that no representation by Justice Department attorneys will be provided. If the prosecuting division indicates that the employee is a target of an investigation concerning the act or acts for which he seeks representation, but no decision to seek an indictment or issue an information has been made, a private attorney may be provided to the employee at federal expense under the procedures of § 50.16.

(6) If conflicts exist between the legal or factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Some situations may make it advisable that private representation be provided to all conflicting groups and that Justice Department attorneys be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(7) Once undertaken, representation under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures, have ended, or until any of the foregoing bases for declining or withdrawing from representation is found to exist, including without limitation the basis that representation is not in the interest of the United States. In any of the latter events, the representing Department attorney on the case will seek to withdraw but will ensure to the maximum extent possible that the employee is not prejudiced thereby.

(8) Justice Department attorneys who represent employees under this section undertake a full and traditional attorney-client relationship with the employees with respect to the attorney-client privilege. If representation is discontinued for any reason, any incriminating information gained by the attorney in the course of representing the employee continues to be subject to the attorney-client privilege. All legal arguments appropriate to the employee's case will be made unless they conflict with governmental positions. Where adequate representation requires the making of a legal argument which conflicts with a governmental position, the Department attorney shall so advise the employee.

(b) Representation by Department of Justice attorneys is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding in which the employee is a defendant;

(2) The employee is a target of a federal criminal investigation on the same subject matter;

(3) The act or acts with regard to which the employee desires representation do not reasonably appear to have been performed within the scope of his employment with the federal government; or

(4) It is otherwise determined by the Department that it is not in the interest of the United States to represent the employee.

[Order No. 683-77, 42 FR 5695, Jan. 31, 1977]

§ 50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense may be provided to a federal employee only in the instances described in § 50.15 (a)(5) and (a)(6).

(b) Where private counsel is provided, the following procedures will apply:

(1) The Department of Justice must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the employing agency.

(2) Federal payments to private counsel for an employee will cease if the Department of Justice (i) decides to seek an indictment of or to issue an information against that employee on a federal criminal charge relating to the act or acts concerning which representation was undertaken; (ii) determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment; (iii) resolves the conflict described in § 50.15(a)(6) and tenders representation by Department of Justice attorneys; (iv) determines that representation is not in the interest of the United States; (v) terminates the retainer with the concurrence of the employee-client, for any reason.

(c) In any case in which the employee is not represented by a Department of Justice attorney, the Department of Justice may seek leave to intervene or appear as amicus curiae on behalf of the United States to assure adequate consideration of issues of governmental concern.

[Order No. 683-77, 42 FR 5696, Jan. 31, 1977]

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28 U.S.C. § 2676

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

APPENDIX B

Opinion of the District Court.

United States District Court,
W. D. North Carolina,
Charlotte Division.

Oct. 14, 1977.

The Aetna Casualty and Surety Company, Aetna Insurance Company, American Empire Insurance Company, Commercial Union Insurance Company, Compagnies D'Assurances Du Groupe Concorde, Continental Casualty Company, Employers Mutual Liability Insurance Company of Wisconsin, Hartford Fire Insurance Company, Industrial Indemnity Company, Maryland Casualty Company, Reliance Insurance Company, Royal Indemnity Company, St. Paul Fire and Marine Insurance Company, Security Insurance Company of Hartford, the Travelers Indemnity Company, Underwriters at Lloyd's and Associated British Insurance Companies, United States Fidelity and Guaranty Company, United States Fire Insurance Company and Zurich Insurance Company, Plaintiffs,

v.

United States of America, Bernard C. Groseclose, Alden E. Hare, William L. Hogan and Dennis L. Hunter, Defendants.

No. C-C-77-41.

Order

McMillan, District Judge.

Plaintiffs brought this suit against the United States to recover as subrogees their losses allegedly exceeding

$20,000,000.00 resulting from the crash of Eastern Air Lines' Flight 212 near Charlotte, North Carolina, on the 11th day of September, 1974.

The United States, through the Department of Justice, is providing a defense on behalf of the United States itself and on behalf of Bernard C. Groseclose, chief of the air traffic controllers at the Charlotte airport, and the three air traffic controllers who had duties with respect to the approach of the aircraft. These controllers are the defendants Dennis L. Hunter, the approach controller; Alden E. Hare, the local controller; and William L. Hogan, who was then and there supervising the work of Hare, a trainee in the job.

The defendant Groseclose was in overall charge of the operation of the tower and the training of air traffic controllers.

The defendant Hunter, the "approach controller," was an experienced controller whose duties included making radio contact with approaching aircraft while they were a considerable distance away from the airport and issuing instructions as needed to enable the aircraft to line up with the runway and begin to make its landing approach.

The defendant Hare, a trainee in the "local controller" position, had the duty of assuming tower communications with the aircraft when it was "handed off" by Mr. Hunter, and of giving any instructions necessary to get the aircraft lined up and keep it lined up so that it would be approaching the end of the runway going in the right direction.

The defendant Hogan was supervising the work of the trainee defendant, Hare.

None of the air traffic controllers as far as is now known had ever been given the affirmative duty to read or estimate from their radar scopes how high approaching aircraft were above the ground and to warn aircraft pilots when they were dangerously close to the ground.

The crash of the plane resulted when the pilots flew it into the ground several miles short of the runway and a considerable distance *below* the level of the runway.

[1] Counsel for the plaintiffs have filed a motion to disqualify the Department of Justice from representing both the government and the controllers upon the theory that there is a conflict of interest between the interests of the government and that of the controllers.

I find that there is such a conflict and that adequate representation of the individual controllers can not be provided by lawyers who also have the obligation to defend the United States at large against the charges being made in the pleadings.

Each controller has an interest in avoiding personal responsibility upon any theory that the government has a duty to tell approaching airplane pilots that they are flying too close to the ground. If the plaintiffs prove their theory that the government has or assumed such a duty, each individual controller should be free to defend himself upon the basis, if the evidence justifies it, that he personally had assumed no such duty *and* had no such duty imposed upon him. He should not be prejudiced by representation by a lawyer who has to defend the government generally against that charge.

The individual defendant Groseclose is entitled to the defense and contention that he loyally passed on to the individual controller all instructions and training required of him and that regardless of what duty might be imposed upon the governmnet, he had not been directed by the government, and had not undertaken to carry out, the duty of telling air line pilots that they were flying too close to the ground.

The "approach controller" Hunter is entitiled to be represented by counsel free to admit or contend that he had neither assumed nor been subjected to the duty of giving warnings to aircraft flying too close to the ground. He is also entitled to the contention that when he handed the plane over to the local controller, everything was A-OK and that the responsibility, if any, lay with the local controller.

The "local controller" Hare is entitled to contend that if there was fault on the part of the government it lay with his supervisor, Mr. Hogan, or with others up the line, and with the approach controller, and that the critical course of the plane had been set by others before his contact with the plane ever began.

The defendant Hogan is entitled to the contention that his supervision over the defendant Hare was flawless and that if Hare was in any way responsible, his fault was some last moment oversight rather than something which could have been prevented by training and supervision.

From the above general summaries of attitudes, among others, which competent counsel should be free to take if the facts justify, it is fully obvious that a conflict exists between the vigorous representation of the interests of each individual defendant on the one hand and a vigorous representation of the interests of the United States at large on the other.

Moreover, it is apparent that the interests of each individual defendant can not be adequately served unless counsel for each defendant is entitled to put the blame upon fellow controllers if the facts so justify.

To require one lawyer or team of lawyers to represent both the individual defendants and the government forces those attorneys into a violation of Ethical Consideration 5-15 and Disciplinary Rule 5-105(B) of the American Bar Association Code of Professional Responsibility. Ethical Consideration 5-15 provides:

> "If a lawyer is requested to [represent] multiple clients having potentially different interests, he must

> weigh carefully the possibility that his judgment may be impaired or his loyalty divided . . . He should resolve all doubts against the propriety of representation. A LAWYER SHOULD NEVER REPRESENT IN LITIGATION MULTIPLE PARTIES WITH CONFLICTING INTERESTS, AND THERE ARE FEW SITUATIONS IN WHICH HE WOULD BE JUSTIFIED IN REPRESENTING IN LITIGATION MULTIPLE CLIENTS WITH POTENTIALLY CONFLICTING INTERESTS . . . If the interests vary only slightly, it is generally likely that the lawyer . . . can retain his independent judgment." (Emphasis added.)

DR 5-105 goes on to provide that an attorney can not represent multiple interests in litigation unless "it is obvious that [the attorney] can adequately represent the interest of each and if each consents to the representation."

[2, 3] Government counsel say that each of the individual defendants has been fully informed and has consented to the joint representation which is being afforded, and that this ought to solve the problem. There are two difficulties with that point of view. In the first place, the consent of an individual litigant can not be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. In the second place, even though consent has been given, DR 5-105 is not complied with because it is not "obvious that [the attorney] can adequately represent the interest" of each individual defendant.

Contrary to the government's view that there is only a remote possibility of conflict among the defendants, this court is of the opinion that an actual conflict exists.

Some suggestion was made that counsel could withdraw if an actual conflict developed in the course of the trial.

Since the actual conflict is already upon us, I am not persuaded that this would be wise; moreover, this case is too bulky and involves too many people for the court to run the risk of withdrawal of counsel in mid-trial and the ensuing mistrial which would have to be allowed.

The government has made several other contentions:

> (a) That the United States will pay any judgment awarded against the individuals. Unfortunately, no statute is cited and no bond has been posted to cover that contingency.
>
> (b) That the FAA Facility Manual, page 37, requires the United States to foot the bill. The court is not satisfied that this manual binds the Treasury. Moreover, the manual itself is something less than a guaranty. It says that "even if a money judgment were obtained against an employee individually the FAA would *in a proper* case institute action seeking passage . . . by the Congress . . . for the relief of the employee." "Proper case" is not defined.
>
> (c) That judgment against the employees is barred by 28 U.S.C. § 2676, which provides:
>
> "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." This statute does not help the individual defendants unless and until a judgment has been rendered against the government.

The trouble with all these contentions about the government's obligation or willingness to stand good for any loss is that the rule against representing conflicting interests is a matter of principle having to do with the integrity and

effectiveness of lawyers and of the trial process; and it is not to be swept under the rug simply because the government may have a deep pocket and has attorneys who are sure that that government will "do right" if things go wrong. The conflict remains regardless of whoever pays; moreover, the taxpayers are entitled to representation by a district attorney or attorney general whose loyalty is not clouded by possible conflicting claims or rights of the controllers themselves.

It is somewhat puzzling that the question should be receiving so much attention in view of the Department of Justice's "STATEMENT OF POLICY" in the form of Order No. 683 77 dated January 19, 1977, which in paragraph 3 reads as follows:

> "The Department will likewise pay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department."

Private counsel are expensive and getting more so; but the unimpeachable conduct of a case of this possible magnitude would seem to be more important both to the taxpayers and the individuals involved than the attorneys' fees which might be involved.

IT IS THEREFORE ORDERED:

1. That in the opinion of this court, the United States Attorney is, because of irreconcilable conflicts of interest, disqualified from representing the individual defendants.

2. That if this decision is not appealable as of right the court nevertheless certifies under 28 U.S.C. § 1292(b) that

it involves a controlling question of law and practice as to which there may be ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. (At the hearing I indicated an unwillingness to certify this question, but since as announced at the hearing I do not believe there should be more than one more trial on any of the issues of liability arising out of the crash of Eastern Flight 212, and since all the cases now pending were filed quite late in the game, I am not opposed to letting all plaintiffs wait for trial until this question is decided.)

3. That since the only thing involved in this appeal is the propriety of conflicting representation, no appeal from this order shall work any postponement of pleadings or discovery or otherwise prevent orderly progress without interruption toward complete readiness for trial.

Opinion of the Court of Appeals.

No. 77-2303

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANY, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY and ZURICH INSURANCE COMPANY,

Appellees,

v.

UNITED STATES OF AMERICA,

Appellant,

and

BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Defendants.

Argued December 7, 1977 Decided January 31, 1978

Before HAYNSWORTH, Chief Judge; BUTZNER, Circuit Judge, and FIELD, Senior Circuit Judge.

Opinion of the Court of Appeals.

FIELD, Senior Circuit Judge:

The United States has appealed from an order of the district judge disqualifying the Department of Justice and the United States Attorney from representing four of its individual codefendants in this case. The district court concluded that such representation would violate Disciplinary Rules 5-105(A) and 5-105(B) of the Code of Professional Responsibility adopted by the North Carolina State Bar effective January 1, 1974. 4A Gen. Stat. Append. VII 240 (Supp. 1975).[1]

The substantive litigation arises out of the crash of Eastern Airlines Flight 212 as it approached the airport at Charlotte, North Carolina, on the morning of September 11, 1974. At the time of the crash the individual defendants, Bernard C. Groseclose, Alden E. Hare, William L. Hogan and Dennis L. Hunter, were on duty at the air-

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[1] DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105 (C).

(C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

port as air traffic controllers employed by the Federal Aviation Administration.[2]

The plaintiff insurance companies have paid approximately twenty-five million dollars in settlement of wrongful death, personal injury, and property damage claims arising from the plane crash, and they filed this action on February 9, 1977, against the United States and the four federal air traffic controllers mentioned above. Charging that the negligence of the defendants was the proximate cause of the crash, the plaintiffs seek indemnification and contribution from the defendants for the amounts paid in settlement of the various insurance claims. Jurisdiction for the action against the United States is alleged under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and for the claims against the individual defendants under 28 U.S.C. § 1332. The plaintiffs have charged, and the Government admits, that at the time of the crash the four individual defendants were acting within the course and scope of their employment.

On March 23, 1977, the four individual defendants, who at the time were represented by the Department of Justice, filed a motion for summary judgment or, in the alternative, to dismiss the complaint. On May 2, 1977, the plaintiff insurance companies filed a memorandum and affidavit in opposition to the motion, and on the same day filed the motion to disqualify government counsel from representing the four air traffic controllers. The district judge conducted a non-evidentiary hearing on the motions on May 17, 1977, and, while indicating that he perceived a conflict of interest on the part of the Government counsel, deferred ruling on the disqualification motion for a

[2] Groseclose was Chief of the Air Traffic Controllers at the Charlotte airport. At the time of the crash, Hunter was the approach controller; Hare, a trainee, was the local controller and was being supervised by Hogan.

period of thirty days in the hope that the matter might be resolved without further action by the court. By order entered on May 19, 1977, the motions of the individual defendants for dismissal or summary judgment were denied.

On June 29, 1977, the Deputy Assistant Attorney General for the Civil Defense Division of the Department of Justice wrote to the district court and requested an opportunity to present additional evidence and argument bearing upon the existence of any potential conflict of interest between the United States and the individual defendants. He further advised the court that the question had been carefully reviewed in the Department of Justice and that the Department could discern "no conflict at the present time", and that the possibility of any conflict developing in the future appeared "extremely remote". He stated that the matter had been discussed at length with the individual defendants and that they had "knowingly and intelligently asserted their desire to be represented jointly by the Department of Justice".

The district court convened a second hearing on July 25, 1977, at which time the Deputy Assistant Attorney General was present, together with the four defendant air traffic controllers and counsel for their union. The court was advised that the question of conflict had been discussed with the air controllers in the presence of counsel for their union and that they, with the concurrence of the union counsel, consented to, and indeed demanded, joint representation by the Government. Counsel for the Department of Justice suggested that the court examine the individual defendants *in camera*, or otherwise hear their testimony with respect to the issue of full disclosure and informed consent to joint representation. The district judge, however, declined these suggestions and advised the parties that he would defer action for another ten days, indicating that if the Government failed to change its position he would enter adverse findings on the conflict ques-

tion. By letter of August 3, 1977, the Department of Justice advised the court that the Government adhered to its position, and on October 14, 1977, the district court entered the order of disqualification from which the Government has appealed.

As a prefatory matter, we note that it is now well established that the order of a district court granting or denying a motion to disqualify an attorney is a final order appealable pursuant to 28 U.S.C. § 1291, *MacKethan* v. *Peat, Marwick, Mitchell & Co.*, 557 F.2d 395, 396 (4 Cir. 1977); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2 Cir. 1974), and we reject the argument of the plaintiffs that the United States is not an aggrieved party and therefore lacks standing to prosecute this appeal. The United States Attorney and the Department of Justice are the targets of the district court's order and, in our opinion, it would be sophistic to say that the Government is not adversely affected by their disqualification. See *In Re Investigation before April 1975 Grand Jury*, 531 F.2d 600, 606 (D.C. Cir. 1976).[3]

Turning to the merits of the appeal, the plaintiffs contend that the scope of our review is limited to a determination of whether the district court abused its permissible discretion. While some of the cases support the position of the plaintiffs on this point, more recently the courts have expressed serious reservations about whether the limited abuse of discretion standard is appropriate in dis-

[3] Counsel for the plaintiffs also suggests that we should dismiss this appeal as a sanction against the Government for its violation of the statutory provisions regarding the use of reports of the National Transportation Safety Board. We agree with the Government that the reference to the report in its brief relative to the present appeal does not contravene the statutes in question, 49 U.S.C. § 1903(c) and 49 U.S.C. § 1441(e), which provide that no such reports "shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

qualification cases where only a purely legal question is at issue. *Woods* v. *Covington Cty. Bank*, 537 F.2d 804 (5 Cir. 1976); *Kroungold* v. *Triester*, 521 F.2d 763, 765, n.2 (3 Cir. 1975); *American Roller Company* v. *Budinger*, 513 F.2d 982, 985, n.3 (3 Cir. 1975). We are inclined to agree with the Fifth Circuit that "[i]n disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms,"[4] and that it is appropriate for us "to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles."[5]

It is our opinion that in disqualifying the Department of Justice in this case the district court erred in two respects. First of all, we find nothing in the record to support the conclusion of the court that "an actual conflict exists."[6] We agree with counsel for the Government that in reaching this conclusion the court appears to have taken the position that the mere existence of multiple defendants in a case such as this inevitably creates a conflict of interest on the part of the lawyer undertaking to represent them. At the hearings and in its order the district court pointed out possible contentions which might be made by each of the four controllers which would exculpate him from liability, but cast the blame upon one or more of his codefendants, including the Government. These hypotheses, however, were based solely upon conjecture and ignored the representation of Government counsel, which was accepted by the court, that in the conference between the representatives of the Department of

[4] Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5 Cir. 1976).

[5] *Id.*

[6] App. 143.

Justice and the controllers, there was no dispute among them either with respect to their duties and responsibilities or the details of the plane crash.[7]

Bearing further on the question is the fact that there is little or no possibility that the four controllers will incur any personal liability as a result of this litigation. As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances any finding of negligence against them would be imputed to the Government

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[7] This lack of any dispute among the defendants apparently disturbs counsel for the plaintiffs. At the initial hearing on the motion the following colloquy took place:

> Court: Does it hurt the plaintiffs? Does it harm your clients if the defendants happen to have lawyers who can't represent either client adequately?
>
> Mr. Rutherford: I think it does because I think and experience has shown that when the government attorney represents everybody in a piece of litigation that the position taken by everybody is uniform, then in effect there is almost a conspiracy of silence as to what truly happened with respect to the air traffic controller management of this particular flight. (App. 61).

From this it appears to us that in filing the motion for disqualification, counsel for the plaintiffs seems to have been motivated more by a desire to fragmentize the defense than by any sensitivity to the ethical considerations involved. While it is true that when such motions are based on Canon 4 of the Code of Professional Responsibility the court must consider the rights of both adversaries in the litigation, Canon 5 is addressed solely to the relationship between the attorney and his immediate clients. With respect to multiple representation, Disciplinary Rule 5-105 is designed to protect the interests of those clients, and their interests alone, and the impact of such multiple representation upon the plaintiffs is irrelevant. We further note that cases involving the multiple representation of criminal defendants are largely inapposite since in such cases the court is required to consider the multiple representation in the light of the constitutional right to effective assistance of counsel under the Sixth Amendment.

and place liability upon it under the Tort Claims Act. Additionally, we note that if the Government and the controllers should be held to be jointly liable, the individual defendants would not be required to pay the damages, since a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against them. 28 U.S.C. § 2676; see *Gilman* v. *United States*, 206 F.2d 846, 848 (9 Cir. 1953), *aff'd* 347 U.S. 507. These, we think, are practical considerations which appropriately should have entered into the disposition of the motion.

Even, however, assuming the existence of a conflict, we think the district court erred in its reading of Disciplinary Rule 5-105(C) which permits an attorney to represent multiple parties who are in a position of potential conflict "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." The court accepted the representations of the Department of Justice relative to such disclosure and consent, but, nevertheless, discounted them entirely upon the basis that such consent "can not be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest."[8] We find no authority or reason to support the theory that the consent to multiple representation under the Rule can be effective only upon the advice of an independent attorney, but, in any event, as we have noted, counsel for the air controllers' union participated in the discussions between the individual defendants and the Department of Justice, and we think it reasonable to assume that he was aware of any problems and properly advised the controllers with respect to their best interests.

---

[8] App. 142-143.

The district court, however, further took the position that even if there were full disclosure and "fully informed consent", the Government was barred from representation because it was not "obvious" that it could adequately represent the interest of each defendant. In the light of what we have said in this opinion we think it is "obvious" that the Government can adequately represent the interests of the air controllers. Indeed, it appears to us that such representation is highly desirable since these defendants will have the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation, and will be spared the burden upon their time and resources incident to the employment of independent counsel.

Noting that motions to disqualify lawyer-opponents upon alleged ethical grounds have become increasingly common in the litigation process, in *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (1975), the Second Circuit requested four bar associations to file briefs on the subject as *amici curiae*. In its brief the Connecticut Bar Association made the following comments:

> It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.

527 F.2d at 1293. Viewed in the light of these observations, with which we are in full accord, the plaintiffs' motion should have been denied. Accordingly, we reverse the order of the district court.

REVERSED.

Order Denying Petition for Rehearing and for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2303

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company; and Zurich Insurance Company,

Appellees,

versus

United States of America *and* Bernard C. Groseclose, Alden E. Hare, William L. Hogan and Dennis L. Hunter,

Appellants.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no

judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

It is FURTHER ORDERED that the appellee's motion to supplement the record is granted.

Entered at the direction of Judge Field for a panel consisting of Chief Judge Haynsworth, Judge Butzner, and Judge Field.

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

Supreme Court, U.S.
FILED
JUN 16 1978
MICHAEL RODAK, JR., CLERK

No. 77-1565

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE AETNA CASUALTY AND SURETY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

MORTON HOLLANDER,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A26) is reported at 570 F. 2d 1197. The opinion of the district court (Pet. App. A10-A17) is reported at 438 F. Supp. 886.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1978. A timely petition for rehearing was denied on March 9, 1978 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on May 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Department of Justice and its attorneys may represent the United States and four federal air traffic controllers in a Federal Tort Claims Act suit, with the informed consent of the individual defendants.

STATEMENT

1. This litigation stems from the crash of a commercial airliner at Charlotte, North Carolina, on September 11, 1974. Petitioners, various liability and hull insurance companies, have paid approximately $25 million in settlement of wrongful death, personal injury, and property damage claims arising out of the crash. They brought this action for indemnification and contribution against the United States and four air traffic controllers employed by the Federal Aviation Administration, alleging that the defendants' negligence caused the crash (Pet. App. A19-A20).

In accordance with 28 U.S.C. 517 and 28 C.F.R. 50.15, the Department of Justice undertook to represent the four controllers. After government counsel filed a motion for summary judgment or dismissal of the complaint, petitioners filed a motion to disqualify government counsel from representing the four controllers. Petitioners contended that joint representation of all the defendants by government counsel would violate Disciplinary Rules (DR)5-105(A) and 5-105(B) of the *Code of Professional Responsibility* adopted by the North Carolina State Bar "in that the individual defendants are potentially adverse parties and the same attorney cannot represent their interests without an ethical conflict" (App. 21).[1]

[1]"App." refers to the joint appendix filed in the court of appeals.

Government counsel advised the court that he had obtained the written consent of the four controllers to be jointly represented together with the United States, that he had reviewed every aspect of the joint representation with the controllers and with his superiors at the Department of Justice, and that in the government's considered view there was no conflict of interest among the defendants (App. 72-73). A senior Justice Department representative similarly informed the court that, after extensive review, the Department had determined that joint representation was appropriate because "there is no conflict at the present time" and "the possibility of a conflict developing in the future is extremely remote" (App. 87). He added that "the individual defendants have been fully advised of the nature of the potential conflicts and have knowingly and intelligently asserted their desire to be represented jointly by the Department of Justice" (App. 87-88).

At a hearing before the district court, the Department's representative explained to the court that the government had thoroughly reviewed the conflict charge with the controllers in the presence of an independent attorney from the controllers' union, and that the controllers, with the concurrence of the union attorney, had consented to and indeed demanded joint representation by the Department of Justice (App. 92-95, 102, 104, 107-109).[2] The representative also informed the court that "[n]o individual defendant in this case is in possession of any evidence which is in any way damaging to the position of the other defendants or the United States" (App. 97).

[2]Petitioners suggest that the court of appeals may have been "misled" about the role of the independent attorney from the air traffic controllers' union in these discussions (Pet. 23-24 n. 14). We

2. On October 14, 1977, the district court disqualified government counsel from representing the controllers, concluding that joint representation in this case would violate Ethical Consideration 5-15 and Disciplinary Rule 5-105(B) of the *Code of Professional Responsibility* (Pet. App. A13).

The court of appeals reversed. It first rejected petitioners' argument that the United States is not an aggrieved party and therefore lacks standing to prosecute the appeal. The court observed that the United States Attorney and the Department of Justice "are the targets of the district court's order and, in our opinion, it would be sophistic to say that the Government is not adversely affected by their disqualification" (Pet. App. A22).

The court then stated that, because the case presented the purely legal question whether the Department of Justice is disqualified from representing the controllers under North Carolina law, the proper standard of review is whether the district court applied correct legal principles to the undisputed facts of the case (Pet. App. A23).

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stand by the statement in our brief in the court of appeals (Br. 10) that the government "thoroughly reviewed the conflict charge with the controllers in the presence of independent counsel for the air traffic controllers' union, and *** the controllers, with the concurrence of the independent union counsel, consented to—and *demanded*—joint representation by the Government." Two of the defendant controllers, Hunter and Hare, are union members. Union counsel participated in the discussions at the Department of Justice in order to inform the Department about the union's views strongly supporting joint representation of individual controllers in cases of this nature, to assist the Department in determining the possibility of conflict in this case, and to provide advice and guidance to the two union members (and the tw non-union members, if they wished). We find nothing in the court of appeals' opinion to indicate that the court was "misled" about the role of union counsel.

On the merits, the court of appeals held that the record does not support the district court's conclusion that the case presents an actual conflict of interest. The district court's conclusion, the court of appeals held, was "based solely upon conjecture" and "ignored the representation of Government counsel, which was accepted by the court, that in the conference between the representatives of the Department of Justice and the controllers, there was no dispute among them either with respect to their duties and responsibilities or the details of the plane crash" (Pet. App. A23-A24).

The court of appeals also noted that the district court had not taken proper account of the practical considerations bearing on the question of conflict, including the near certainty that the four controllers would incur no personal liability as a result of the litigation. Since the parties had agreed that at all relevant times the controllers were acting within the scope of their official employment, "any finding of negligence against them would be imputed to the Government and place liability upon it under the Tort Claims Act" (Pet. App. A24-A25). Furthermore, "if the Government and the controllers should be held to be jointly liable, the individual defendants would not be required to pay the damages, since a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against them" (*id.* at A25).

Finally, the court of appeals held that the district court was incorrect in assuming that a client's consent to multiple representation could be effective only on the advice of an independent attorney (Pet. App. A25). Because, in the court's view, it was "obvious" that the government could provide adequate multiple representation, the court held the disqualification improper. Indeed, as

the court pointed out, representation of the controllers by the Department of Justice "is highly desirable since these defendants will have the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation, and will be spared the burden upon their time and resources incident to the employment of independent counsel" (*id.* at A26).

ARGUMENT

1. Petitioners argue (Pet. 11-16) that the United States could not properly appeal from the disqualification order. They claim that the court of appeals' ruling that the United States had standing to appeal conflicts with other decisions holding that attorneys cannot appeal, without their clients' consent, from judgments adversely affecting their clients' interests.

The decisions cited by petitioners are inapposite. The United States—the appellant in the court of appeals—is not an attorney. It is a party to this litigation. Unlike a private attorney, who generally has no independent interest in a case and who therefore has no basis for taking an appeal without the client's consent, the United States has a distinct interest in the question whether the Department of Justice may represent federal employees who are sued for acts performed within the scope of their official employment. Federal employees could well be inhibited in the performance of their official duties if they knew they would have to retain private counsel to represent them in complex damage suits arising from their official actions. The United States also has a pecuniary interest in the disqualification order because it will pay for the individual defendants' private counsel if the Department of Justice is not permitted to conduct the representation. 28 C.F.R. 50.15-50.16.

In any event, petitioners' objection is really one of form rather than substance. The four defendant controllers have consistently demanded that the Department of Justice represent them in this lawsuit (App. 104, 107-109). Because an appeal undoubtedly would have been proper if the controllers had been designated as appellants, petitioners' contention that their failure to join as party-appellants should defeat the appeal is plainly not of sufficient significance to warrant the attention of this Court.

2. Petitioners further contend (Pet. 16-20) that the court of appeals applied the wrong legal standard in reviewing the district court's decision. Petitioners argue that the court of appeals should have employed an "abuse of discretion" standard rather than reviewing the disqualification order for legal error.

In reviewing district court disqualification rulings, appellate courts regularly apply the "abuse of discretion" standard. See, *e.g.*, *United States* v. *Clarkson*, 567 F. 2d 270, 272 n. 2 (C.A. 4); *In re Gopman*, 531 F. 2d 262, 266 (C.A. 5); *Hull* v. *Celanese Corp.*, 513 F. 2d 568, 571 (C.A. 2); *Richardson* v. *Hamilton International Corp.*, 469 F. 2d 1382 (C.A. 3), certiorari denied, 411 U.S. 986. This standard requires that the court of appeals give broad leeway to the district court in finding facts, in drawing inferences from the facts, and in making ethical judgments about particular conduct. However, the "abuse of discretion" standard does not require an appellate court to give special deference to a district court with respect to a pure question of law. An appellate court should correct errors of law regardless of the standard of review. A district court has no "discretion" to make an error of law. See, *e.g.*, *County of Maricopa* v. *Maberry*, 555 F. 2d 207, 223 (C.A. 9); *Premium Service Corp.* v. *Sperry &*

Hutchinson Co., 511 F. 2d 225, 229 (C.A. 9); *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752, 756 (C.A. D.C.); *National Land & Investment Co.* v. *Specter*, 428 F. 2d 91, 95 (C.A. 3). The Third and the Fifth Circuits agree with the court below that in a disqualification case presenting solely a question of law, an appellate court is free to review the district court's ruling for legal error. See *Kroungold* v. *Triester*, 521 F. 2d 763, 765 n. 2 (C.A. 3); *American Roller Co.* v. *Budinger*, 513 F. 2d 982, 985 n. 3 (C.A. 3); *Woods* v. *Covington County Bank*, 537 F. 2d 804, 810 (C.A. 5). There is accordingly no conflict among the circuits on this issue and no reason for review by this Court.

3. Petitioners next argue (Pet. 21-26) that the court of appeals erred by not remanding the case to the district court for an evidentiary hearing on the question whether the controllers had given their informed consent to joint representation by government attorneys. But the district court accepted the government's representation that the controllers were advised "at great length" of the conflict charges made by petitioners and nevertheless consented to joint representation (App. 95). Petitioners did not challenge the accuracy of that representation (*ibid.*). The single issue presented to the court of appeals was whether, on these undisputed facts, joint representation by government counsel would violate the *Code of Professional Responsibility*. No evidentiary hearing was or is needed to resolve that issue, because there are no material facts in dispute.

4. Finally, petitioners contend (Pet. 27-34) that the court of appeals improperly ignored the "potential" for a conflict of interest in this case.

The district court created a rule effectively prohibiting the Department of Justice from representing more than one party in Tort Claims Act cases. As the court of appeals properly ruled, there is no basis for such a rule generally, and there is no basis for application of such a rule to the undisputed facts of this case. Indeed, there would seem to be at least as great a theoretical possibility of conflict among petitioners—19 hull and liability insurers who might have widely disparate views on such matters as settlement but who nevertheless were and continue to be jointly represented by the same counsel—as among the defendants.

Petitioners suggest that the court of appeals improperly rested its conclusion that there is no potential for conflict in this case on the assumption that the four controllers would not be liable for any judgment that might be entered against them. This argument is wide of the mark for two reasons. First, the court of appeals did not rest its conclusion that disqualification was improper on this ground alone; the court observed that there is no dispute among the controllers about their duties and responsibilities or about the details of the crash, and the court noted that representation of the controllers by the Department of Justice would be "highly desirable" because of the Department's expertise in this highly technical and involved litigation (Pet. App. A24, A26). Second, the fact that there is no realistic prospect that the controllers will incur any personal liability as a result of the litigation is, as the court held, one of the "practical considerations" that appropriately bears on the question whether joint representation should be allowed in this case (Pet. App. A25). Because the individual defendants

are little more than nominal parties to this lawsuit,[3] their interest in pursuing potentially different litigation strategies is greatly reduced, and any prospect of injury to them from the lack of separate counsel is similarly minimized.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

MORTON HOLLANDER,
NEIL H. KOSLOWE,
Attorneys.

JUNE 1978.

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[3]Because the controllers were acting within the scope of their employment, a finding that they were negligent (and that the negligence was responsible for the accident) would lead to liability by the United States. If the United States should be held liable, that liability would be exclusive. 28 U.S.C. 2676. Although some circumstances—such as a disagreement between the jury's verdict in the individual defendants' cases and the judge's findings in the United States' case—could lead to the entry of a judgment against the individual defendants, the prospect of that outcome is remote.

[4]In response to petitioners' expressions of concern for the controllers' right to independent representation, the court of appeals observed that, in filing the motion for disqualification, "counsel for the plaintiffs seems to have been motivated more by a desire to fragmentize the defense than by any sensitivity to the ethical considerations involved" (Pet. App. A24 n. 7). While Disciplinary Rule 5-105 was designed to protect the interests of clients in obtaining proper representation, it was not designed as a tactical device by which plaintiffs could seek to disrupt the presentation of a common defense (*ibid.*).

Supreme Court, U. S.
FILED
JUN 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1565

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Defendants.

PETITIONERS' REPLY BRIEF

WALTER E. RUTHERFORD
One State Street Plaza
New York, New York 10004
Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1565

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

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Defendants.

PETITIONERS' REPLY BRIEF

Preliminary Statement

Petitioners herein have decided to submit this reply brief because respondent United States of America, in its

brief in opposition, has taken positions entirely opposite to those urged by it in the Court of Appeals. It is apparent that the Solicitor General recognizes the erroneous reasoning of the Court of Appeals and now seeks to justify that Court's decision by changing the Government's arguments. The Solicitor General has implicitly recognized that the opinion below is not only wrong, but also contrary to the positions taken by a majority of the Courts of Appeal.

Argument

A. Right to Appeal.

In the Court of Appeals, the United States of America argued that it had standing to appeal because it was disqualified from providing legal representation to the individual defendants. The Court of Appeals accepted this argument and cited as authority for the Government's position *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 606 (D.C. Cir. 1976), which held that an attorney disqualified in grand jury proceedings has standing to take an appeal.

In Point I of their Petition (pp. 11-16), the petitioners argued the error of this position and demonstrated that all other Courts of Appeal have rejected the theory that a disqualified attorney in a civil case had an independent right to appeal.[1]

In its brief in opposition herein, the Solicitor General does not dispute petitioners' arguments on this point nor does he seek to justify the holding of the Court of Appeals that since "[t]he United States Attorney and the Department of Justice are the targets of the district court's order" the United States has a right to appeal (Appendix B, p.

[1] In addition to the circuits listed on pages 14 through 16 of the Petition, the Fifth Circuit has also held that an attorney has no standing to prosecute an appeal in a civil case. *Smith* v. *South Side Loan Co.*, 567 F.2d 306 (5th Cir. 1978).

A 22). Rather, the Solicitor General completely reverses his field and now argues that the Government had a right to appeal the district court's order not as a disqualified attorney (as argued and held below), but as a co-defendant that was aggrieved by the order disqualifying the United States Attorney and the Department of Justice from representing the individual defendants. The Solicitor General argues that the Government had a right to prosecute the appeal below because it has a general interest in defending public employees who are sued, since such suits might inhibit the employees in the performance of their official duties.

We note initially that this speculative argument should be addressed to a Congressional Committee considering a bill to grant all Government employees official immunity, rather than to a Court considering the ethics of attorneys. Nevertheless, while the Government, as an employer, might have a general interest in the subject matter, as a co-defendant tortfeasor being sued for the negligent activities of the Federal Aviation Administration, it has not been aggrieved within the legal meaning of standing to prosecute an appeal from an order disqualifying another party's attorney. *See* Petition, pp. 11-13.

In an effort to cloak themselves with a pecuniary interest in order to justify their appealing status, the Government now argues for the first time that if the Department of Justice cannot represent the individual defendants, the Government will pay for private counsel to defend the controllers pursuant to 28 C.F.R. §§ 50.15 and 50.16.

The Solicitor General is too late with this argument. After the district court disqualified Government counsel from representing the individual defendants, the Government did not hire private counsel for the individuals. The individuals were left in a default status, no appeal was filed in their names and no attorneys were hired for them. At the time of appeal, the Government had no financial interest because it refused to hire independent counsel for the in-

dividual defendants. For the Government to appear now as a gratuitous volunteer, when it realizes its mistakes, and announce in a brief that only if this Court reverses and vacates the opinion of the Court of Appeals will it pay for the individuals' defense counsel, is not only a failure to recognize its ethical obligation but is a classic case of too little-too late. Indeed, to argue that it has a financial interest in this matter only further exacerbates the Department of Justice's conflict of interest in light of Disciplinary Rule (DR) 5-101(A), as adopted by the North Carolina State Bar:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

Perhaps to put this issue in proper perspective, it would be best to recall the simple fact that the individual defendants did not appeal from the order disqualifying the Department of Justice from representing them. It might well be that they were perfectly happy with that order and welcomed the opportunity to hire their own expert aviation attorneys at Government expense.

B. Union Representation.

The Department of Justice argued before the district court and the Court of Appeals that the attorney for the air traffic controllers' union advised the defendant controllers of the facts and the law and that this was evidence that there had been informed consent by the individual defendants.[2]

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[2] The Solicitor General now argues that petitioners did not challenge the Government lawyers' statements of informed consent. However, the record reveals that the Solicitor General's

(footnote continued on following page)

The Solicitor General now admits, via a footnote in his brief (No. 2), that two out of the four individual defendants were not members of the controllers' union, but argues that this was not a material point and did not mislead the Court of Appeals. Petitioners find this argument incredible in light of the Court of Appeals' holding:

> "[C]ounsel for the air controllers' union participated in the discussions between the individual defendants and the Department of Justice, and we think it reasonable to assume that he was aware of any problems and properly advised the controllers with respect to their best interests." (Appendix B, p. A 25).

To first mislead the lower courts as to union representation, and then say it did not mean anything, is completely unacceptable behavior by Government counsel. Are we to also assume that the union attorney was protecting the interests of two non-union members, one of whom was Chief of the Charlotte Tower and a representative of FAA management? Clearly, there was no proof of informed consent, and the only evidence available at this time supports the district court's conclusion that "the consent of an individual litigant cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest." (Appendix B, p. A 14; Petition, p. 21, n. 13).

C. Judgment Against Individual Defendants.

The final reversal of position by the Solicitor General herein pertains to the entry of judgment against the individual defendants. In its brief in the Court of Appeals, the Government argued that there was no conflict of interest

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(footnote continued from preceding page)

argument is completely wrong since petitioners' attorney wrote to the district court pointing out the erroneous legal advice being given to the controllers and that in light thereof, informed consent could not exist (A. 115).

between the Government and the individual controllers because a judgment against the Government would bar the entry of a judgment against the controllers. Government Brief, p. 29. The Court of Appeals accepted this argument (Appendix B, pp. A 24-25), and considered it one of the practical reasons for concluding that Justice Department lawyers could also represent the individual defendants.

Now the Solicitor General admits, again via a footnote in his brief (No. 3), that there could be a judgment only against the individual defendants. This change of position completely destroys one of the main reasons for the Court of Appeals' decision.

Under the Ethical Considerations of the Federal Bar Association (Appendix A, pp. A 3-4), a Government lawyer owes his first loyalty to the agency he is defending. If the Government employee reveals that he failed to follow agency rules and procedures, the Government lawyer must report such infractions to the agency. F.E.C. 4-1 and 4-2 (Appendix A, pp. A 3-4).

With these ethical considerations always present, how can a Government lawyer defend individuals who may be subject to a multi-million dollar judgment, when that same lawyer owes his first loyalty to the agency involved?

The change of position by the Government herein makes it obvious that there is such a gross conflict of interest that summary reversal may well be in order.

CONCLUSION

The petition for a Writ of Certiorari should be granted, the decision below vacated, and the case remanded for further proceedings in accordance with the district court's opinion.

Respectfully submitted,

WALTER E. RUTHERFORD
One State Street Plaza
New York, New York 10004
Counsel for Petitioners

On the Brief:

PETER HOENIG
ALAN D. REITZFELD